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Supreme Court, U.S.
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NO. 95-1224

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

EDITH HOROWITZ BROIDA,

Petitioner,

V.

ALVIN EDWARD HOROWITZ, et al,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18pp

TABLE OF AUTHORITIES

CASES

The Florida Bar V. Broida, 574 So.2d 83 (Fla. 1991) . 12

Lew V. Moss, 797 F.2d 747 (9th Cir. 1986) 7, 8

Scoggins v. Pollock, 727 F.2d 1025 (11th Cir. 1984) 6, 7

Smith v. Sperling, 77 S.Ct. 1112, 354 U.S. 91,
1 L.Ed. 2d 1205 (1957) 7

STATUTES

28 U.S.C. @ 636 (b) 4

42 U.S.C. @ 1983 4,5

28 U.S.C. @ 1331 (a)(1) 7,9

SUPREME COURT RULES

Sup. Ct. R. 10 (1995) 8,9

Sup. Ct. R. 14.1 (a) (1995) 10,11

QUESTIONS PRESENTED

WHETHER THE RULING OF THE DISTRICT COURT DISMISSING THE PETITIONER'S CAUSE DUE TO LACK OF DIVERSITY OF CITIZENSHIP BETWEEN THE PLAINTIFF AND THE DEFENDANTS WAS CLEARLY ERRONEOUS.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Honorable C. Clyde Atkings, federal district court, Southern Division, Miami,Florida

Magistrate Ted E. Bandstra, Magistrate Judge

Appeal judges Eleventh Circuit Court, Anderson, Edmondson, Carnes

Edith Broida, Petitioner

Alvin Edward Horowitz, Respondent

Stephen Ronald Horowitz, Respondent

Paula Horowitz Roth, Respondent

Karen Horowitz Kaplan, Respondent

Betsy Horowitz Nieves, Respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLES OF AUTHORITIES ii

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE. 2

REASONS FOR DENYING THE WRIT 6

I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE RULING OF THE DISTRICT COURT DISMISSING THE PETITIONER'S CAUSE DUE TO LACK OF DIVERSITY OF CITIZENSHIP BETWEEN THE PLAINTIFF AND THE DEFENDANTS WAS NOT CLEARLY ERRONEOUS 6

II. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHEN THE PURPORTED ERROR BELOW CONSISTS OF AN ALLEGEDLY ERRONEOUS FACTUAL FINDING 8

III. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHEN THE ASSERTED ERROR BELOW CONSISTS OF THE PURPORTED MISAPPLICATION OF A PROPERLY STATED RULE OF LAW 9

IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW ARE VERBOSE, INCOHERENT, AGRUMENTATIVE AND REPETITIVE 10

V. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT FAILS TO PRESENT WITH ACCURACY, BREVITY, AND CLARITY MATTERS ESSENTIAL TO REQUIRING CONSIDERATION 11

CONCLUSION 13

OPINIONS BELOW

The opinions below are unreported. The order of the United States District Court for the Southern District of Florida dismissing the Petitioner's action was issued on June 5, 1993 in case 92-0298 Civ. Atkins. This order can be found on page 5 of the Petitioner's Appendix. The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's dismissal of the Petitioner's action was issued on April 27, 1995, and can be found on page 3 of the Petitioner's Appendix. The Eleventh Circuit denied the Petitioner's Petition for Rehearing on November 6, 1995, and this order can found on page 2 of the Petitioner's Appendix.

JURISDICTIONAL STATEMENT

The Petition falls within the Court's jurisdiction to review final decisions of the federal courts of appeal by certiorari. 28 U.S.C. @ 1251(1). The Eleventh Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C. @ 1291 pertaining to review of of a final decision by the United States District Court.

STATEMENT OF THE CASE

The respondents do not accept the Petitioner's Statement of the Case as it is self-serving, misleading and irrelevant. Lost amid the rhetoric of the Petition is the real issue at hand, which has been properly ruled upon by the District Court, and affirmed by the Eleventh Circuit. Stated succinctly, the Petitioner's case was dismissed because she failed to sustain her burden of establishing complete diversity of citizenship between herself and the Respondents. A review of the facts and the case law on this issue will show that the decisions of the lower courts on this issue were correct, and that this Petition should be denied.

Those portions of the Petition which address issues other than subject matter jurisdiction are irrelevant and do not merit a response. Thus, while the Petition seemingly presents five separate questions to the court, the Respondents will only address the single issue of subject matter jurisdiction as it relates to diversity of citizenship.

This proceeding commenced upon Petitioner filing of a complaint against her brother and his four children. The Petitioner's cause of action is based on a probate suit in the Florida state court in Dade County, Florida, that was probated in 1978. The Respondents timely filed their Motion to Dismiss the complaint alleging lack of jurisdiction due to the District Court's lack of subject matter jurisdiction.

The District Judge referred the Respondent's motion to dismiss to the United States Magistrate Ted E. Bandstra, pursuant to 28 U.S.C. @ 636 (b).

The magistrate hear oral arguments of the Respondents' motions on September 10, 1992, and also granted all parties an additional sixty (60) days to conduct further discovery on the issue of the court's diversity jurisdiction over this action and to file supplemental motions to dismiss together with any factual materials obtained through discovery on the jurisdictional issue.

The Respondents asserted in their motion to dismiss that at the commencement of this action the Petitioner was a citizen of the State of Florida rather than of the District of Columbia as she claimed. The Respondents also argued that the Petitioner failed to state a claim for civil rights violations arising under 42 U.S.C. @ 1983, and therefore, there was no federal question jurisdiction.

Magistrate Bandstra entered his detailed Report and Recommendations, the 20th day of May, 1993, which recommended that the Respondents' Motion to Dismiss be granted. (Petitioner's Appendix p. 5). The Magistrate's Report determined that the Petitioner was a citizen of Florida at the time of the commencement of the action, and therefore, there was no diversity of Jurisdiction. Magistrate Bandstra also determined that the Petitioner had failed to state the claim under 42 U.S.C. @ 1983, and therefore, there was no federal question jurisdiction. (Petitioner's Appendix p. 5). The Petitioner objected to the report and recom-

mendation. Upon review, the Honorable C. Clyde Atkins entered an order adopting the report and recommendation, granting Respondents' motion to dismiss. (Petitioner's Appendix p. 5). In the appeal before the Eleventh Circuit, Petitioner did not challenged the determination that she failed to state a claim under 42 U.S.C. @ 1983.

In an unpublished opinion dated April 27, 1995, the United States Court of Appeals for the Eleventh Circuit affirmed the ruling of the District Court. (Petitioner's Appendix p. 4).

REASONS FOR DENYING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE RULING OF THE DISTRICT COURT DISMISSING THE PETITIONER'S CAUSE DUE TO LACK OF DIVERSITY OF CITIZENSHIP BETWEEN THE PETITIONER AND THE RESPONDENTS WAS NOT CLEARLY ERRONEOUS.

Magistrate Judge Bandstra found that the Petitioner failed to sustain her burden of proving complete diversity of citizenship. Lew v. Moss, 797 F. 2nd 747, 750 (9th Cir. 1986). That determination must be affirmed unless clearly erroneous. Scoggins V. Pollock, 727 F.2d 1025, 1027 (11th Cir. 1984).

The decision of the district court is not clearly erroneous. By her own admission, the Petitioner was domiciled in Florida until December 4, 1987. On that date the Petitioner allegedly "declared" that she was a citizen of Washington D.C.. The Petitioner made this declaration while residing in Florida. Based primarily on this "declaration" of the Petitioner, she contends that she was a citizen of Washington D.C. when this cause of action was commenced on February 7, 1992. (Petitioner's Appendix p. 5). Clearly, in order for

subject matter jurisdiction to conferred by the District Court under 28 U.S.C. @ 1331 (a)(1), complete diversity of citizenship between the Petitioner and the Respondents must exist when the action was filed. Smith v. Sperling, 77 S.Ct. 1112, 1114, 354 U.S. 91, 93 (1957). Thus, the only inquiry is whether her declaration, made December 4, 1987 while she was physically present in Florida, effected a change in her domicile. The answer to that question is clearly negative.

A change in domicile requires the confluence of physical presence at the new location with an intention to remain their indefinitely. Scoggins v. Pollock, 727 F. 2d 1025, 1026 (11th Cir. 1984). Ms. Broida met neither requirement. The Petitioner has stated that she was physically present in Florida, except for brief occasional visits to Washington, since 1977 and through the commencement of this proceeding. When the Petitioner "declared" her domicile to be Washington, D.C. on December 4, 1987

she was not present in Washington,D.C. with the intention to remain their indefinitely. Therefore, the Petitioner did not effectively change her domicile. The order of the district court is not clearly erroneous and was properly affirmed by the Eleventh Circuit.

II. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHEN THE PURPORTED ERROR BELOW CONSISTS OF AN ALLEGEDLY ERRONEOUS FACTUAL FINDING.

According to the rules of the Supreme Court, a petition for a writ of certiorari is rarely granted when the asserted error consists of an allegedly erroneous factual finding by a lower court. Sup. Ct. R. 10 (1995). The determination at issue in this appeal is whether the Petitioner was domiciled in Florida or Washington D.C. when she filed the action in the United States District Court for the Southern District of Florida on February 7, 1992. A determination pertaining to domicile is essentially factual in nature. Lew V. Moss, 797 F2d 747,750 (9th Cir. 1995). While the Petitioner no doubt disagrees

with the factual determination made below, review of such a determination on certiorari is inappropriate.

III. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHEN THE ASSERTED ERROR BELOW CONSISTS OF THE PURPORTED MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

According to the Rules of the Supreme Court a petition for writ of certiorari is rarely granted when the asserted error consists of a purported misapplication of a properly stated rule of law. Sup. Ct. R. 10 (1995). The rule of law at issue in this appeal is clear: the District Courts of the United States lack subject matter jurisdiction over a dispute where there is not complete diversity of citizenship between the Petitioner and the Respondents. 28 U.S.C. @ 1332(a)(1). The District Court properly stated this rule of law in its order ratifying the determination of the Magistrate. (Petitioner Appendix p. 5). While the Petitioner believes that this rule of law has been improperly applied to her, she does not dispute that complete diversity of citizenship is a prerequisite to the proper exercise of subject matter jurisdiction by the District Court. Under such circumstances, review

on certiorari is inappropriate,

IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED FOR REVIEW ARE VERBOSE, INCOHERENT AND REPETITIVE.

The Petitioner argues that the district judge in setting this instant case for trial on the merits when only one defendant had been served showed a complete lack of knowledge of the subject matter before him was error. The Petitioner in arguing this point fails to cite any law to support her position.

The Respondents filed their motions to dismiss and appeared in open court before the Magistrate on September 10, 1992 on their motions. The Magistrate granted all parties an additional sixty (60) days to conduct further discovery on the issue of the Court's diversity jurisdiction over this action and to file any supplemental motions on the jurisdictional issue.

Even a cursory review of the questions presented in the Petition demonstrate that they are plainly violative of the Supreme Court rule which requires that such questions be expressed concisely, and that they not be argumentative. Sup.Ct R. 14.1(a)(1995).

The questions presented in the petition are not tailored in a manner amenable to reasoned and coherent discourse, and determining what issures are raised by these questions, much less formulation an appropriate response to the questions, is nearly impossible. Having violated Supreme Court Rule 14.1 (a), review on certiorari should by denied.

V. THE WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE IT FAILS TO PRESENT WITH ACCURACY, BREVITY, AND CLARITY MATTERS ESSENTIAL TO READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

The instant Petition is a diatribe which fails to properly focus on the real issue at hand: whether there was complete diversity of citizenship when the current action was filed. Instead of focusing on the District Court's subject matter jurisdiction, the Petition attempts to have this Court re-address issues which have already been decided by state circuit courts, state appellate courts, Florida's Supreme Court, the United States Supreme Court, the United States District Court, and the United States Court of Appeals over the course of seventeen years of litigation pursued by the Petitioner. The opinion

of the Eleventh Circuit Court of Appeals addresses the lack of subject matter jurisdiction, and no other issue. The Rules of the Supreme Court require that a petition for a writ of certiorari present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration. Sup. Ct.R. 14.4 (1995). Instead of focusing on the essential issues, the Petitioner has raised numerous points which neither merit nor require this Court's consideration.

Additionally, the Petitioner's unreasonable attitude toward the judicial process is well documented. The pursuit of frivolous claims and personal attacks on lawyers and judges caused her to be suspended from the practice of law by the Supreme Court of Florida in 1991. The Florida Bar V. Broida, 574 So. 2d 83 (Fla. 1991).

CONCLUSION

For all of the reasons mentioned above, the Respondents, BETSY H. NIEVES and PAULA ROTH, request that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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